Inasmuch as the several matters objected to or insisted upon and considered by the Court, do not appear by the record, and the said defendants, Stanley Howitt, Flora Post Lee and James F. Dewhurst and Terence P. O'Rourke, did on the 28th day of February, 1945, during said term, proposed this their Bill of Exceptions and the rulings of said Judge and request him to sign the same, which, after due notice to the United States Attorney, is done this 28th day of February, 1945, at Miami, Florida.

I further certify that the foregoing Bill of Exceptions contains all of the evidence introduced in the trial of the above entitled cause, and all of the charges and motions for directed verdicts.

Dated at Miami, Florida, this March 1st, 1945, as of JWH this 28th day of February, 1945.

JOHN W. HOLLAND,
(John W. Holland)
District Judge.

315 CLERK'S CERTIFICATE.

United States of America,
Southern District of Florida, ss,

I, EDWIN R. WILLIAMS, Clerk of the District Court of the United States for the Southern District of Florida, do hereby certify that the foregoing pages numbered from 1 to 315, inclusive, contain a true, full and complete copy of all such portions of the record, proceedings and evidence in cases styled United States of America, plaintiff, vs. Stanley Howitt, Flora Post Lee, and James Dewhurst, defendants, No. 6399-M-Cr., and United States of America, plaintiff, vs. Terence P. O'Rourke, defendant, No. 6400-M-Cr. as appear upon the records and files of my office that have been designated by written directions of the parties to be included in this record on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said Court at Miami, Florida, on this the 23rd day of March, A. D. 1945.

(Seal)

EDWIN R. WILLIAMS,
Clerk of the District Court of the United States for the Southern District of Florida.

By EARLE F. SPRIGG,
Deputy Clerk.

[Stamp:] U. S. Circuit Court of Appeals. Filed Apr. 24, 1945. Oakley Fe Dodd, Clerk

SUPPLEMENTAL TRANSCRIPT OF RECORD.

UNITED STATES

CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT.

No. 11,287

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST AND TERENCE P. O'ROURKE,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the District Court of the United States for the Southern District of Florida.

(SUPPLEMENTAL RECORD RECEIVED APR. 21/45.)

1—354

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

No. 11,287.

STANLEY HOWITT, FLORA POST LEE, JAMES DEW-HURST AND TERENCE P. O'ROURKE,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the District Court of the United States for the Southern District of Florida.

It Is Hereby Agreed between counsel for Appellants and counsel for Appellee that the Clerk of this Court print a supplement to the Transcript herein, and include therein the following instructions:

Government's Request for Instruction No. 1.

Given:

The indictment charges a conspiracy to violate four different sections of the Interstate Commerce Act, first, by the collection and receipt of unreasonable and unjust charges for services rendered in connection with transportation of passengers over the lines of a common carrier; second, by the collection and receipt from certain persons of greater compensation for services than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons; and fourth, by the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Com-

mission. The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other device is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission.

Government's Request for Instruction No. 2.

"It is not necessary for the Government to allege or prove that the carrier was a party to the act complained of here or that the acts were intentionally committed by the carrier."

Not Given:

Their commission by a person acting for or employed by the carrier is sufficient to constitute an offense under Section 10 of the Act.

"• • • it is immaterial whether what he does or fails to do in violation of the statute is with or without the orders of his principal."

Toledo A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 736;
United States v. Tozer, 37 Fed. Rep. 635.

Government's Request for Instruction No. 3.

Section 10, of Title 49, United States Code, provides in part:

"Any common carrier subject to the provisions of this chapter, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done, any act, matter or thing in this chapter prohibited or declared to be unlawful, or shall aid or abet therein, * * *"

Not Given:

Aiders and abetters as used in Section 10 include employees of the carrier and they are responsible as principals.

The defendants here, employees of the carrier, are contemplated within the provisions of Section 10 as aiders and abetters, and if you find as charged by the Government, they are responsible as principals under Section 550, Title 18, United States Code.

Government's Request for Instruction No. 4.

Refused:

Discrimination under the statute by an employee, ticket agent, is possible, though the carrier may not have participated in the unlawful profits and may not be chargeable through some official or vice-principal. The ticket agent in such case may be prosecuted under the statute as the principal, the crime of aiding and abetting being by statute made a substantive offense. It follows

that as an aider or abettor under the statute, the ticket agent is a principal and not an accessory.

Government's Request for Instruction No. 5.

Refused:

The regularly established rates for transportation of passengers and for Pullman accommodations duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. The defendants are charted with notice of it, and they must abide by it. This rule embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & N. R. R. Co. v. Maxwell, (Tenn. 1915) 237 U. S. 94, 97.

Government's Request for Instruction No. 6.

Refused:

The whole purpose of the Interstate Commerce Act is to secure public service at reasonable and uniform rates, and this purpose is obviously defeated when an employee of a carrier under color of his office, without the collusion of the carrier, and for his sole benefit, requires purchasers to pay for a ticket a greater compensation than the established rate. The desired aim is uniform and reasonable rates to the public using the facilities of the carrier and equality of opportunity in obtaining the use of transportation facilities, so that all persons may carry on their activities on an equal basis. A person who wilfully sells or furnishes a service at a rate different from the established uniform rate or wilfully prefers particular persons in the sale and distribution of transportation facilities to the prejudice or disadvantage of other persons

violates the spirit as well as the letter of the law and commits a misdemeanor under Section 10.

United States v. Estes, 6 F. (2d) 902, 905;
Union Pacific Railroad Co. v. United States, 313 U. S. 450, 461.

Government's Request for Instruction No. 7.

Given:

Passenger transportation facilities must be available to all persons alike who offer to pay the properly scheduled rates therefor.

Not Given:

If you find that the defendants were paid in excess of the regularly scheduled rates and gave undue advantages therefor, the defendants have committed a discrimination and preference within the contemplation and language of the Act.

Government's Request for Instruction No. 8.

Given:

The jury are instructed that the regularly established rates for transportation of passengers and for Pullman accommodations are the only lawful charge which may be made.

Not Given:

If you find that a charge in excess of the scheduled tariff was made for services contemplated by the regular fare, then such excess charge is unreasonable and unjust within the meaning of the statute (Sections 1(5) and 6(7).

Louisville & N. R. R. Co. v. Maxwell, 237 U. S. 94, 97.
Part 3 of memorandum, particularly that part contained on pp. 21-24.

Government's Request for Instruction No. 9.

Given:

Passenger accommodations should be equally available to the general public,

Not given:

So if you find that the defendants conspired to make transportation facilities or Pullman space available for the use of persons who paid them more than the regular fare, then your yerdict should be guilty.

Government's Request for Instruction No. 10.

Refused:

If you find that it was in the power of the defendant ..... to assign reservations of space for the accommodation of passengers, and that the other defendants and ..... conspired to collect sums of money in consideration for which they would prefer the person who paid them in the distribution of Pullman space and thus subject other persons to disadvantage, then your verdict should be guilty.

*Insert name of diagram clerk.

Dated at Miami, Florida, this 20th day of April, 1945.

BART. A. RILEY,
Attorneys for Appellants.
ERNEST L. LUHAIME,
Attorneys for Appellee.

[fol. 272] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:—

ARGUMENT AND SUBMISSION

Extract from the Minutes of May 23rd, 1945

No. 11287

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST AND TERENCE P. O'ROURKE

versus

UNITED STATES OF AMERICA

On this day this cause was called, and, after argument by Bart A. Riley, Esq., for appellants, and Ernest L. Duhaime, Esq., Assistant United States Attorney, and Irvin Goldstein, Esq., Assistant to Attorney General, for appellee, was submitted to the Court.

[fol. 273] OPINION OF THE COURT—Filed June 14, 1945

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11287

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST AND TERENCE P. O'ROURKE, Appellants,

versus

UNITED STATES OF AMERICA, Appellee

Appeals from the District Court of the United States for the Southern District of Florida

(June 14, 1945)

Before Holmes, McCord, and Lee, Circuit Judges

HOLMES, Circuit Judge:

Appellants Howitt and Dewhurst, ticket sellers of the Florida East Coast Railway Company, and appellant Lee, diagram clerk for the railroad, all located at Miami, Florida,

were indicted for conspiracy to violate the Interstate Com-
[fol. 274] merce Act [1] by agreeing together and with other persons unknown to charge and collect from purchasers of transportation accommodations money in excess of the regular fares currently in force under prevailing tariffs for such service. Appellant O'Rourke, a ticket seller for the same carrier in Miami, was charged on an indictment in ten counts with committing substantive offenses in violation of the act in substantially the same manner as alleged in the conspiracy charge. The indictments were consolidated and tried together; the defendants were convicted and have appealed.

It is contended that the trial court erred in

1. Overruling demurrers to the indictments;

2. Sustaining demurrers to the pleas in bar;

3. Overruling defendants' motion for a directed verdict based upon the insufficiency of the evidence; and

4. Giving certain instructions to the jury.

The demurrers to the indictments were grounded upon the theory that the Interstate Commerce Act, the aim of which was the prevention of discrimination by carriers, did not create any offense against others than carriers except where the carrier was the principal offender and individuals aided and abetted. Upon this premise it is argued that, since these indictments charged violations by individuals only, without alleging the participation or connivance of any carrier, the indictments charged no offense against the United States.

While it is probable that the legislative mind did not foresee offenses of this particular character when the law was passed, nevertheless the act was drafted in language [fol. 275] sufficiently broad to include such offenses by individual employees of a carrier, especially where the offenses resulted in the unjust discrimination that the act was designed to prevent.[2] Section 1(5) of the act re-

[1] 49 U. S. C. A., Sections 1 et seq.

[2] Interstate Commerce Commission v. Baltimore, 145 U. S. 265; Texas, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 197; L. & N. R. Co. v. United States, 282 U. S. 740; Mitchell v. United States, 313 U. S. 80; Kirkpatrick v. United States, 195 So. 692.

quires that all charges made for any service rendered in the transportation of passengers shall be just and reasonable. The schedule of rates required to be established, published, and filed with the Interstate Commerce Commission, is *prima facie* the criterion in determining whether or not a charge is reasonable.[3] Section 2 of the act provides that no carrier shall receive from any person a greater or less compensation for any service in the transportation of passengers than it received from any other person for the same service. Section 10 of the Act provides that where the carrier is a corporation, any person employed by the corporation who willfully does anything prohibited or declared unlawful by the act, or aids and abets therein, shall be guilty of a misdemeanor.

This question has been raised and decided in other cases. In *United States v. Peterson*, 1 F. (2) 1018, a demurrer was sustained to a similar indictment on the very ground that is here urged, namely, that since no common carrier was charged with guilt as a principal, the carrier's employees could not be guilty because they were not of the class that alone could commit the acts denounced as offenses by the statutes. This district court opinion stands alone, according to our research, and the great weight of authority is on the other side.

In *United States v. Tozer*, 37 Fed. 637, the demurrer to a similar indictment was overruled on the ground that "when an agent of a railroad is prosecuted under the [fol. 276] statute for an unlawful act, it is not necessary . . . either to allege or prove that the particular unlawful act complained of was done under authority conferred by his principal, or by its direction." The *Tozer* case was expressly approved by Judge Taft in *Toledo, etc., Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730. There a locomotive engineer was held subject to the penalties of Section 10 of the Interstate Commerce Act where he, while acting as engineer, refused to handle interstate freight for a shipper, the court saying that it was immaterial whether what he did or failed to do was with or without the orders of his principal. The well-reasoned opinion in *United States v. Estes*, 6 F. (2) 902, is to the same effect, and the Supreme Court

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[3] Kinnavey v. Terminal R. Association of St. Louis, 81 Fed. 802.

recently held in *Union Pacific Railroad Company v. United States*, 313 U. S. 450, that action by any person to bring about discrimination in respect to the transportation of property is made unlawful by the Elkins Act. Considerations similar to those here mentioned led the court to adopt this view. These authorities, together with the thought that any other conclusion would do violence to the purpose of the act, constrain us to hold that the demurrers to the indictments were properly overruled.

The plea in bar to each indictment was based upon the claim that the defendants were made witnesses against themselves under legal compulsion, and that the evidence so produced was used to indict and convict them, wherefore they were entitled to the immunity extended by Sections 43, 46, and 47 of the Interstate Commerce Act. These statutes provide that in summary proceedings in the district court, or in hearings before the Interstate Commerce Commission, or in any other cause or proceeding, where the purpose of the proceeding is to inquire into alleged violations of the act, no person shall be prosecuted or subjected to any [fol. 277] penalty or forfeiture for any matter concerning which he may testify or produce evidence in such proceeding.

On March 3, 1944, warrants for the arrest of the defendants were issued to the Federal Bureau of Investigation for violations of the Interstate Commerce Act. On March 4, 1944, agents of the F. B. I. separately asked each of the defendants to come to their offices for interrogation. The warrants were not then produced, and the defendants were not then arrested, but each came willingly. After being separately questioned for four or five hours, each signed a statement that set forth the facts given in response to questions asked. They were then arrested, arraigned, and granted bail. Several days later the agents again questioned each defendant, but no claim is made that any statement given was induced by wrongful means.

Section 48 of the Interstate Commerce Act reads as follows: "Under the immunity provisions in Sections 43, 46, and 47 immunity shall extend only to natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath." This statute requires no elucidation. We need only observe that, since the evidence produced by the defendants was not

given in response to a subpoena and was not under oath, it did not come within the cited immunity provisions.

We need not pause long upon the third and fourth assignments. The railroad company by whom these defendants were employed was a common carrier subject to the Interstate Commerce Act, and its lawful rates had been filed with the Interstate Commerce Commission. The rates specified therein were the only charges that could legally be [fol. 278] exacted for the services rendered.[4] The evidence adduced upon the trial proved beyond question that the defendants repeatedly and systematically took advantage of the prevailing war-time congestion in transportation to exact from applicants for accommodations more money than the regular rate prescribed, and appropriated the difference to themselves. It is also clear that the excess payment ordinarily was not a gratuity given for service, but a substantial fee paid as a condition precedent to securing a ticket, and that in either event the necessary result of the overcharge was to assess rates in excess of prevailing tariffs and to discriminate between passengers. This evidence not only warranted the submission of the case to the jury, but also made appropriate the instructions to which exceptions were taken. The crucial question for the jury was whether the offenses charged had been committed; the method thereof had no legal significance.[5]

Affirmed.

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[4] L. & N. R. Co. v. Maxwell, 237 U. S. 94; Great Northern Ry. Co. v. Merchants' Elevator Co., 259 U. S. 285.

[5] N. Y., N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 398; Armour Packing Company v. United States, 209 U. S. 72; Union Pacific R. Co. v. United States, 313 U. S. 450, 462.

[fol. 279] JUDGMENT

Extract from the Minutes of June 14th, 1945

No. 11287

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST and TERENCE P. O'ROURKE

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

[fols. 280-290] PETITION FOR REHEARING—Filed July 5, 1945

PETITION FOR REHEARING.

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FIFTH CIRCUIT.

Come now Stanley Howitt, Flora Post Lee and James F. Dewhurst, appellants in the "conspiracy case", and Terence P. O'Rourke, appellant, in "substantive offenses" case, and requests a rehearing of said cause, in which final judgment was rendered by this court on June 14, 1945, affirming the judgment of the court below; and in support of this petition respectfully shows:

I.

That this honorable Court inadvertently stated in the opinion that the defendants (Howitt, et al.) were indicted for conspiracy "to CHARGE AND COLLECT from purchasers of transportation, etc.", when the indictments in the conspiracy case and O'Rourke case, allege that the defendants did "COLLECT AND RECEIVE" money in excess of the prevailing tariff rates, although both Sections 2, and sub-section 7 of Section 6, Title 49, uses the language: "CHARGE, DEMAND, COLLECT, RECEIVE", but the person who drafted the indictments refrained from the use of the words "CHARGE" and "DEMAND".

II.

The opinion of this honorable Court is bottomed upon the premise that the defendants did "col-

lect from purchasers of transportation accommodations *money in excess of the regular fares currently in force under prevailing tariffs* for such service." This, following the reasoning of the court, (and particularly with reference to the O'Rourke case), is a violation of Sub-section 7 of Section 6, which, after providing for the filing and publishing of rates, says "nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time, * * *". And the court overlooked that a violation of such section of the Interstate Commerce Act is a misdemeanor under Section 10, and subjects the offender "TO A FINE OF NOT TO EXCEED $5,000 for each offense." The defendant O'Rourke's indictment by its allegation is not based on Section 2 of the Act which covers "Special rates and rebates" and for the violation of which "such common carrier shall be deemed guilty of UNJUST DISCRIMINATION, which is prohibited and declared to be unlawful," and he is not subject to imprisonment under the proviso to Section 10. Therefore the judgment against O'Rourke of imprisonment for the period of eighteen months on counts 1, 2, 3, 4, 7, 8, 9, and 10 of the indictment, to run concurrently, should be reversed. (He was fined $1,000 in addition—R. P. 67).

III.

Without repeating the recitations in paragraph II of this petition, but incorporating them herein, it is respectfully suggested that the court overlooked that portion of the opinion in *United States v. Estes*, 6 F.(2d) 902, reading: "That rate having been ascertained, all other rates become unlawful and any corporation or person who sells or attempts to sell or furnish a service for a different rate, violates the spirit as well as the letter of the law, AND COMMITS A MISDEMEANOR UNDER SECTION 10." (Italics supplied.) Therefore O'Rourke is only subject to the fine of $1,000 imposed by Judge Holland, and the judgment as to imprisonment is unlawful. (Note: Roy H. Johnson, Clerk, United States District Court, Chicago, Illinois, in response to writer's recent request, wired writer that "On June 30, 1925, Estes and Kinnet pleaded guilty. Estes fined $100.00, Kinnett $200.00. No costs. Fines paid.").

IV.

Although the odd-numbered counts in the O'Rourke indictment conclude "Contrary to the form of the statute in such case made and provided (Title 49, U. S. C. 2, 10)", the allegations therein reveal that the offense in fact was the receipt of a stated amount of money above the tariff schedule, and those counts are therefore similar to the even-numbered counts, and based upon the opinion of the honorable Court, the imprisonment sentence as to O'Rourke should be set aside.

V.

This honorable Court, in citing the *Tozer* case, 37 Fed. 637, overlooks the fact that the railroad company, in that case, and not the agent, received the extra freight charges thus differentiating that case from the case at bar. (See Charge of Court in *U. S. v. Tozer*, 39 Fed. 369.)

VI.

This honorable Court, in its opinion, overlooked the construction of the Interstate Commerce Act by the Congress and the departmental construction by Interstate Commerce Commission in this particular, that when it came to the attention of the Congress, and the enforcement agency that employees of railroad companies were accepting gifts, gratuities, and bribes, for the purpose of influencing the decision of the employees with respect to the supply, distribution or movement of cars or other vehicles, or vessels, used IN THE TRANSPORTATION OF PROPERTY (emphasis supplied), the Congress enacted legislation to curb such evil, to-wit:

Title 49, Sec. 1, Sub-section (17), (b) reads as follows:

> "It shall be unlawful for any person to offer or give or cause or procure to be offered or given, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, to any person acting

for or employed by any carrier by railroad subject to this part with intent to influence his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. It shall be unlawful for any person acting for or employed by any carrier by railroad subject to this chapter to solicit, accept, or receive, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, with intent to be influenced thereby in his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property."

VII.

This honorable Court, in construing the Interstate Commerce Act, overlooked that in 1889, when it came to the attention of the Interstate Commerce Commission and the Congress that shippers were paying money or other thing of value, to induce carriers or agents to discriminate in regard to shipping of property, the Congress enacted what is now Section 10, paragraph 4, reading as follows:

(4) If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of

value, solicitation, or otherwise, induce or attempt to induce any common carrier subject to the provisions of this part, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

VIII.

And the Court in its construction of the Interstate Commerce Act, overlooked that in 1889, in

regard to false billing as now contained in Sec. 10, Par. 2, the Congress stated:

> "Any common carrier subject to the provision of this act, or, whenever such common carrier is a corporation, any *officer or agent thereof, or any person acting for or employed by such corporation*, who, by means of false billing," etc.

shall permit property to be transported at less than the regular rates, shall be guilty of a misdemeanor, and omitted to use similar language in its statutes of 1889, amending Sec. 6, Par. 7, relating to rates, rebates and privileges, in its statutes of 1920, amending Section 2 and 3 of the Act relating respectively to rebates and undue preferences.

IX.

When the court states that "the act was drafted in language sufficiently broad to include offenses by individual employees," etc., although the legislative mind did not "forsee offenses of this particular character when the law was passed," the court overlooked a guide to construction of legislative acts as prescribed by our Supreme Court and epitomized in the opinion of Mr. Justice Butler, in *Lanzetta v. State of New Jersey*, 306 U. S. 451, 83 L. Ed. 888, wherein he says:

> "It is the statute, and not the accusation under it, that prescribes the rule to govern conduct and warn against transgression,"

and "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."

X.

The court overlooked, in the opening sentence of its opinion, that the conspiracy indictment covered the commission of four distinct offenses, described under paragraphs A, B, C, and D, and which, in the charge (R. P. 251) of trial Judge Holland, were described as

> "In the conspiracy case there are four different sections of the Interstate Commerce Act involved; first by the collection and receipt of unreasonable and unjust charges for services rendered in connection with transportation of passengers over the lines of a common carrier; second by the collection and receipt from certain persons of greater compensation for service than would be collected and received from others; third, by the making and giving of undue preferences and advantages to certain persons, and, fourth, by the collection and receipt of greater compensation for service than the rates specified in the tariffs filed with the Interstate Commerce Commission,"

while this Honorable Court, in its opinion, says that the defendants conspired "to charge and collect from purchasers of transportation accommo-

dations money in excess of the regular fares currently in force under prevailing tariffs for such service," and further concludes; "This evidence not only warranted the submission of the case to the jury, but also made appropriate the instructions to which exceptions were taken," and with this stated premise and conclusion, the court overlooked the serious injury to the defendants by the giving of the charge (R. P. 251):

> "The Interstate Commerce Act does not specify or limit these violations to any particular method by which the violations may be committed. Whether this is done by the exaction of additional fees by compulsion, or by way of gratuity or tips, or by any other devise, is of no materiality to the commission of the offense, if the compulsion, or tip, or any device used, brings about an unreasonable or unjust charge for services rendered in connection with transportation of passengers, or the collection and receipt from certain persons of greater compensation for services than would be collected and received from others, or the making and giving of undue preferences and advantages to certain persons, or the collection and receipt of greater compensation for services than the rates specified in the tariffs filed with the Interstate Commerce Commission."

Said charge deprived the defendants of any defense, even in an instance where a witness handed out $15.00 for a Pullman ticket costing $12.43, and

told the agent to "keep the change." (R. P. 222 and 233.)

Wherefore it is respectfully requested that the court will grant this petition for rehearing.

Respectfully submitted,

BART. A. RILEY,
A. C. DRESSLER,
Attorneys for Appellants.

I, Bart. A. Riley, of Counsel for the appellants herein, do certify that the foregoing petition is not presented for the purpose of delay, and is in the opinion of counsel, well founded in point of law.

BART. A. RILEY

STATE OF NEW YORK,
COUNTY OF ALBANY.

I, Bart. A. Riley, being duly sworn, say that on the 2nd day of July, 1945, at Albany, N. Y., I personally mailed a copy of the foregoing petition, in a securely sealed, addressed envelope, with proper United States postage affixed, to each of the following at the address indicated:

HON. TOM C. CLARK,
Attorney General,
Washington, D. C.

HON. IRVIN GOLDSTEIN,
Attorney, Department of Justice,
Washington, D. C.

11

Hon. Herbert S. Phillips,
United States Attorney,
Tampa, Florida.

Hon. Ernest L. Duhaime,
Asst. U. S. Attorney,
Miami, Florida.

BART. A. RILEY

Subscribed and sworn to
before me July , 1945.

Notary Public.

[fol. 291] ORDER DENYING REHEARING

Extract from the Minutes of July 18th, 1945

No. 11287

STANLEY HOWITT, FLORA POST LEE, JAMES DEWHURST and TERENCE P. O'ROURKE

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 292] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 293] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 15, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.